8-15-2014

Greenfield v. Wurmlinger Respondent's Brief Dckt. 41178

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CHRISTINA J. GREENFIELD Appellant/Plaintiff, vs. ERIC J. WURMLINGER and ROSALYNN D. WURMLINGER, husband and wife, Respondents/Defendants.	Supreme Court Docket No. 41178-2013 Kootenai County Case No. CV-10-8209 **RESPONDENTS' APPELLATE BRIEF**

Appeal from the District Court of the First Judicial District for Kootenai County.
Honorable Lansing Haynes, District Judge, Presiding.

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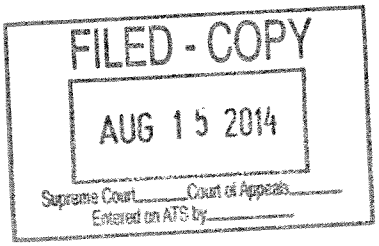

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STATEMENT OF FACTS

This lawsuit involves a dispute between neighbors who own adjacent lots in the Park Wood Place Subdivision, located in Post Falls, Idaho. The development consists of upper scale homes aligned along a single street, which ends in a cul-de-sac. The lots at the end of the development have a single owner and include a large mansion and estate, called "River House." A large stone plaque designates the entrance to the River House. *Tr., Vol. II, pp. 821-822.* Immediately adjacent to the Wurmlingers' home on its south side is The River House's caretaker's cottage, which is the residence of that estate's on-site manager. *See Defendants' Exhibit CC.* Greenfield's home is immediately adjacent to the Wurmlingers' on its north side. *Tr., Vol. II., p. 745, ll. 5-13.* The original owner of Ms. Greenfield's home, Judy Richardson, lived in that home from approximately 1993 until 2005. *Tr., Vol. II, pp. 721-724.*

The Wurmlingers purchased their lot in 1993 and built their home in 1994. *Tr., Vol. I, p. 217, ll. 13-21.* The majority of homes in Park Wood Place were built between 1993 and 1998, with several homes constructed more recently within the last six years. *Tr., Vol. I. pp. 418, ll. 17-24.* The Wurmlingers planted a row of arborvitae trees in 1994 or 1995 near the property line between themselves and Ms. Richardson to provide privacy for both homes and for aesthetic purposes. *Tr., Vol. I, p. 289, ll. 11-24; Tr., Vol. I, p. 299, ll. 12-18.*

The Wurmlingers have a home occupation at their residence – The River Cove Bed and Breakfast – which they began shortly after moving in. They have operated the home occupation at a consistent level since approximately 2005. *Tr., Vol. I, pp. 223-224; Tr., Vol. II, pp 737-738.* The Wurmlingers maintain a home occupation permit with the City of Post Falls for the Bed and

Breakfast. *Tr., Vol. I, p. 232, ll. 11-19; Tr., Vol. II, pp. 786-787.* The Bed and Breakfast is a relatively small operation with only three guest rooms, generating no extra noise or traffic. From the street, as well as neighboring homes, the home has the appearance of what it is – a large, upscale residence. *Tr., Vol. II, pp. 737-741.*

Sometime after the death of her husband, Ms. Richardson decided to sell her home. Eric Wurmlinger advised Ms. Greenfield that Ms. Richardson's home was on the market and suggested that she might be interested. *Tr., Vol. II, pp. 723-724; Tr., Vol. II, p. 734, ll. 16-22.* Greenfield negotiated directly with Ms. Richardson and visited the property twice before purchasing. She was impressed with the view from the home and this was a primary reason for her purchase. *Tr., Vol. II., pp. 585-586.*

At the time of purchase from Ms. Richardson, Greenfield was aware that the Wurmlingers operated a Bed and Breakfast at their home. *Tr., Vol. II, p. 725, ll. 19-23; Tr., Vol. II, pp. 596-598.* Ms. Richardson told Ms. Greenfield of the Bed and Breakfast on one of her visits, pointing out the small brick monument and plaque in the Wurmlingers' front yard. Additionally, Greenfield had previously delivered at least one guest to the Wurmlingers' Bed and Breakfast in connection with her job as a limousine driver. *Tr., Vol. II, p. 573, ll. 3-15.*

At the time of purchase, Ms. Greenfield was also aware of the row of arborvitae near the property line which "made a nice barrier between the properties" and were "fairly high," providing good privacy for both homes. *Tr., Vol. II, pp. 724-725.* In short, although a primary reason for Greenfield's purchase was the view from the home, she had no concerns that the arborvitae hedge was "blocking" that view. *Tr., Vol. II., pp. 583-586, 589, 591-592.*

Initially, Greenfield and the Wurmlingers were friendly with one another. *Tr., Vol. II, p. 509, ll. 6-19.* During the first couple months of her ownership, Ms. Greenfield discussed the Bed and Breakfast operation with Eric Wurmlinger, suggesting that he could refer his guests to a spa she was conducting or hoped to conduct in her new home. *Tr., Vol. II, pp. 574-582.* However, in 2005, Greenfield became upset when the Wurmlingers informed her that the Wurmlingers were planning an addition for their house. *Tr., Vol. II, pp. 510-511.* Greenfield contacted the City, opposing the planned addition. *Tr., Vol. II, p. 513, ll. 6-13.* The Wurmlingers decided not to construct the planned addition to their home. *Tr., Vol. II, pp. 738-739.*

Greenfield began complaining about both the Bed and Breakfast and the arborvitae hedge. In that regard, the City of Post Falls had an ordinance which limited fences to a height of six feet. As originally written, the ordinance specifically included vegetative hedges within the definition of fence. *Defendants' Trial Exhibit "Y" (Judicial Notice Taken (see Amended Clerk's Certificate of Exhibits, p. 7) – Post Falls Ordinance No. 1114 Amending Section 18.24.020 of Post Falls Code).* Ms. Greenfield thus complained to the City, asking that they require Wurmlinger to cut his arborvitae hedge back to six feet. *Tr., Vol. II, p. 516, ll. 12-17; see also Plaintiff's Exhibit #12.* At approximately the same time in 2006, Greenfield hired an attorney, Kacey Wall, to write letters to the Wurmlingers purporting to represent "association members" who were allegedly unhappy with the Wurmlingers' Bed and Breakfast, as well as the height of their hedge. *Tr., Vol. II, p. 515, ll. 4-15.* The first letter complained that the Wurmlingers' Bed and Breakfast was prohibited by the CC&Rs and that the arborvitae were in violation of both the CC&R's restricting fence height and the city ordinance restricting shrub height. *Tr., Vol. II, p.*

516, ll. 18-25; Tr., Vol. I., pp. 322-323; Tr., Vol. I., pp. 349, ll. 20-23. The Wurmlingers responded by letter stating that the arborvitae trees were not a "fence," and thus not subject to the CC&R restricting fence height. *See Plaintiff's Exhibit #16: Tr., Vol. 1, pp. 327-328.*

Based on Greenfield's complaint, a representative of the City, Mr. Collin Coles, wrote the Wurmlingers, advising them of the ordinance and its height restriction for hedges at six feet. The Wurmlingers engaged in negotiations with the City about their arborvitae. *Tr., Vol. II, pp. 818-820.* The Wurmlingers complied with their directives. *Tr., Vol. II, pp. 818-820; see also Plaintiff's Exhibits #12, #14.* Wurmlingers trimmed the arborvitae to the height of six feet as the ordinance required, and the City was satisfied.

As to Ms. Wall's letter, the Wurmlingers responded, stating that the arborvitae trees were not a "fence," and thus not subject to the CC&R restricting fence height. *See Plaintiff's Exhibit #16; Tr., Vol. I., pp. 327-328.* The Wurmlingers' response also explained that they had pruned the arborvitae and that the City of Post Falls was satisfied by the pruning. *See Plaintiff's Exhibit #16.* Kacey Wall then responded that even though the arborvitae still exceed five (5) feet in height, her clients accepted the pruning and were hopeful that the Wurmlingers intended to maintain the arborvitae at their current height. *Tr., Vol. I. pp. 401-402.*

Ms. Greenfield would later contend that the letter exchange created an agreement with the Wurmlingers that they would maintain the arborvitae to a height of six (6) feet. However, the Wurmlingers never agreed to maintain the arborvitae at any specific height. *Tr., Vol. I. pp. 402-403.* There was no communication between Greenfield and the Wurmlingers after the letter exchange. *Tr., Vol. II, p. 751, ll. 10-17.* Greenfield contended that, approximately a year before

the cutting, she had written a letter to Wurmlingers. However, the letter was not dated or signed, and Wurmlingers denied ever receiving it. *See Plaintiff's Exhibit #29; Tr., Vol. II, pp. 809-810.*

Wurmlingers' concern regarding the application of the City Ordinance to hedges was subsequently addressed by the City Council. After public hearing, the Ordinance was amended to eliminate hedges from the six foot restriction. *Tr. Vol. II, pp. 673-674; see also Defendants' Trial Exhibit "Y" (Judicial Notice Taken (see Amended Clerk's Certificate of Exhibits, p. 7) – Post Falls Ordinance No. 1114 Amending Section 18.24.020 of Post Falls Code).*

In 2008, the focus of Greenfield's complaints shifted to wedding ceremonies conducted at the Bed and Breakfast. *Tr., Vol. II, p. 785, ll. 9-16.* Greenfield complained that these weddings were accompanied by loud music and increased traffic and street parking. *Tr., Vol. II, pp. 533-534, pp. 537-538; see also Tr., Vol. I, pp. 278-279.* Greenfield advised the City again and requested that the City act to stop the ceremonies. At one point, Greenfield even confronted a guest at the Bed and Breakfast, Troy Lang, intimating that weddings weren't allowed and that the police were waiting to shut down the Bed and Breakfast. *Tr., Vol. II, pp. 789-790.*

The Wurmlingers received letters from the city about the weddings and responded accordingly. *Tr., Vol. II, p. 785, ll. 17-21.* Ultimately, the Wurmlingers came to a resolution with the City by clarifying the small scale of the wedding ceremonies conducted at the Bed and Breakfast and agreeing to remove any wording from the Bed and Breakfast website suggesting accommodations for larger groups of people. *Tr., Vol. II, pp. 785-786.*

In April, 2010, the Wurmlingers went on vacation. *Tr., Vol. II, p. 751, ll. 6-9.* When they returned, they found that someone had literally cut their arborvitae hedge in half, to a five (5)

foot height. *Tr., Vol. II, pp. 751-752.* The Wurmlingers reported this to the police. They advised that they suspected Ms. Greenfield. Ms. Greenfield complains that they did not also advise the police of her "agreement" with them to maintain the arborvitae hedge at six (6) feet. *Tr., Vol. I., pp. 329-331.*

Both parties made multiple complaints to the police about one another. *E.g., Tr., Vol. I., pp. 350-358; Tr., Vol. II, pp. 617-619; Tr., Vol. II, pp. 793-795.* The Wurmlinger property was vandalized numerous times. *Tr., Vol. I., p. 362, ll. 3-19; Tr., Vol. II, p. 658, ll. 3-14.* In an effort to stop the vandalism and at the suggestion of the police, the Wurmlingers placed several surveillance cameras to monitor their property. *Tr., Vol. II, pp. 709-712.* Ms. Greenfield came to believe that the cameras were aimed at her and were invading her privacy.

These events eventually resulted in Greenfield filing this lawsuit.

STATEMENT OF THE CASE

Greenfield asserted four causes of action against the Wurmlingers: (1) Declaratory Judgment and Injunctive Relief; (2) Nuisance, Abatement and Damages; (3) Intentional Infliction of Emotional Distress; and (4) Negligent Infliction of Emotional Distress.

As to the first cause of action, Greenfield requested the district court to declare that the operation of the Bed and Breakfast violated the CC&Rs and to enjoin its operation at the Wurmlingers' residence. Further, Greenfield requested that the Court declare defendants' arborvitae hedge to be a "fence" and that it therefore violates the CC&Rs restriction on fences. She also asked that defendant be enjoined from allowing the hedge to exceed that fence restriction in the future. Finally, Plaintiff alleged that Wurmlingers had blocked and failed to

maintain an easement established by the CC&Rs for the benefit of the development residents and sought equitable relief in connection therewith.

As to the second cause of action, Greenfield asserted that the arborvitae planted on the Wurmlingers' property obstructed her view of the Spokane River, thus constituting a nuisance which, *inter alia*, reduced her property value. Greenfield sought monetary damages, as well as an Order of Abatement.

As to the third cause of action, intentional infliction of emotional distress, Greenfield claimed, inter alia, that Wurmlingers falsely accused her of damaging/destroying the arborvitae hedge which resulted in her being criminally charged and prosecuted. Although she did not deny that she had had the hedge "trimmed," she contended that her actions were justified. Pointing to the letters by Ms. Wall, Greenfield contended that she had reached an agreement with defendants that they would keep the hedge trimmed to a six foot height and that their failure to do so entitled her to essentially reduce the height of the hedge by half. Further, she alleged that the failure of Wurmlingers to advise the police of this alleged agreement when reporting their suspicions that Greenfield had damaged the hedge, was outrageous conduct.

The fourth cause of action, negligent infliction of emotional distress, was based on the same alleged conduct as the IIED claim, except the conduct was styled as a "breach of duty." The trial court dismissed the intentional infliction of emotional distress count on summary judgment, (*R.., p. 175*), but allowed plaintiff to proceed with a negligent infliction of emotional distress

claim.[1] This included her effort to prove a "contract" with the Wurmlingers that they would maintain the hedge.

The Wurmlingers asserted several counterclaims, only one of which, timber trespass, is at issue in this appeal.

On November 26, 2012, a five-day jury trial commenced with the jury hearing the claims based in law and the district court hearing the evidence as trier of fact on the claims based in equity. At the conclusion of the evidence, the jury was instructed and propounded questions on the Special Verdict Form. Greenfield did not object to any specific jury instruction, take exception that any of hers were not given, nor object to the Special Verdict Form. *Tr. Vol. III, p. 967, ll. 8-13.*

The jury returned a special verdict in favor of the Wurmlingers on each of Greenfield's claims, and also found in favor of the Wurmlingers on their counterclaims. The jury found that neither the Wurmlingers' maintenance of their arborvitae nor the operation of their Bed and Breakfast constituted a nuisance. Additionally, the jury found that the Wurmlingers had not caused Greenfield emotional distress. As to the Wurmlingers' counterclaims, the jury found that the arborvitae qualified as trees and that Greenfield had therefore committed timber trespass with her extensive damaging. The jury awarded the Wurmlingers timber trespass damages in the amount of $17,000.00, which the district court then trebled pursuant to I.C. § 6-202. Lastly, the jury found that Greenfield had negligently inflicted emotional distress on the Wurmlingers, and

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[1] Ms. Greenfield has not appealed the dismissal of her IIED claim.

awarded damages in the amount of $52,000.00 on that claim. Ms. Greenfield has not appealed this finding by the jury or the award of damages.

Having heard the evidence during the trial, the Court requested written closing arguments on the equitable claims. On March 25, 2013, after consideration, the district court issued a Post Court Trial Memorandum Decision and Order, dismissing Greenfield's claims for declaratory judgment and injunctive relief. The district court found that the Bed and Breakfast qualified as a home occupation as envisioned by the CC&Rs and was in compliance with the restrictions provided in those covenants. The district court also found that the Wurmlingers' arborvitae hedge was not a fence and therefore not in violation of the five foot CC&R height restriction for fences.

The Wurmlingers then filed a Motion to Allow Costs, including reasonable attorney fees for work associated with the timber trespass and CC&R claims, which was granted by the district court. The district court awarded costs as a matter of right in the amount of $9,041.77 and reasonable attorney fees in the amount of $56,713.60.

STATEMENT OF ISSUES

The Wurmlingers have attempted to organize and consolidate plaintiff's issues on appeal. The Wurmlingers intend to and believe they have included and addressed each of Greenfield's denominated issues:

1. Does substantial evidence support the district court's finding that the Wurmlingers' operation of the Bed and Breakfast did not violate the CC&Rs?

2. Was the district court correct in finding the CC&R's restriction regarding the height of fences does not apply to the arborvitae hedge, thus declining injunctive relief?

3. Was the jury's finding that the Bed and Breakfast does not constitute a nuisance supported by substantial evidence?

4. Was the jury's finding that the arborvitae do not constitute a nuisance supported by substantial evidence?

5. Was the jury's finding that the Wurmlingers did not negligently inflict emotional distress on Greenfield supported by substantial evidence?

6. Did the district court abuse its discretion in finding that the Wurmlingers' Negligent Infliction of Emotional Distress claim was tried by consent of the parties pursuant to I.R.C.P. 15(b)?

7. Was the jury's timber trespass verdict supported by substantial evidence?

8. Has appellant preserved any issue regarding the jury instructions or the special verdict form when she failed to make objection or take exception to any during trial?

9. Did the district court abuse its discretion by allowing admission of the Monaco survey into evidence?

10. Are Greenfield's constitutional issues properly before the Supreme Court?

11. Did the district judge abuse his discretion by not recusing himself?

12. Did the district judge commit a "fraud upon the court?"

13. Did the district court abuse its discretion by awarding reasonable attorney fees to the Wurmlingers for work associated with the timber trespass and CC&R claims?

14. Are the Wurmlingers entitled to attorney fees on appeal?

ARGUMENT

As an initial principle:

> Pro se litigants are not entitled to special consideration or leniency because they represent themselves. To the contrary, it is well-established that courts will apply the same standards and rules whether or not a party is represented by an attorney and that pro se litigants must follow the same rules, including the rules of procedure.

Bettweiser v. New York Irrigation Dist., 154 Idaho 317, 322, 297 P.3d 1134 (2013). Indeed, any special consideration for pro se litigants would prejudice the opposing litigant for having the assistance of legal counsel. Like in the *Bettweiser* appeal, Greenfield's briefing is difficult to follow. In several instances, it is unclear what issue Greenfield is addressing. Even where the legal issue raised is relatively identifiable, Greenfield fails to present pertinent or persuasive argument, authority, and/or legal reasoning.

Greenfield cites to evidence which was not admitted. *E.g., Respondents' Trial Exhibit #T* on p. 21 of Appellant's Brief. Greenfield also makes numerous statements regarding evidence at trial which are not supported by a citation to the record. *E.g.*, Appellant's Brief, p. 26 ("Both Arborists testified that the ten (10) arborvitae shrubs were neither damaged nor destroyed, but are healthy and thriving, mostly due to pruning.").

Numerous times, Greenfield misrepresents evidence and testimony cited. For example, Greenfield's citation near the top of p. 42 of Appellant's Brief is purportedly to a newspaper

article exhibit wherein Eric Wurmlinger "persecute[s] the Appellant as a 'Hedge Hacker' defaming her good name and distorting the truth to the media." However, the trial exhibit cited by Greenfield (*Plaintiff's Trial Exhibit #100*) does not contain the phrase "Hedge Hacker." The exhibit does contain statements attributed to Eric Wurmlinger, but these statements only address the amount of arborvitae cut, the main purpose of the arborvitae – privacy – and the effect Greenfield's cutting had on the Wurmlinger's privacy. *See Plaintiff's Trial Exhibit #100.*

Furthermore, Greenfield makes numerous uncited factual assertions which are untrue and without foundation. One such example appears on p. 46 of Appellant's Brief where she states, "Appellant objected to the format of the new direct verdict form, stating that it may confuse the jury on the claims." The assertion is not supported by any citation to the record. Indeed, during the jury instructions conference, Judge Haynes specifically asked Greenfield whether she objected to any of the court's proposed jury instructions, the special verdict form or the failure to give any of Greenfield's proposed instructions, and Greenfield did not object. *Tr., Vol. III, p. 967, ll. 8-13.*

Finally, Greenfield cites to her own briefing, as if the factual assertions asserted there were supported by evidence submitted to the jury and the district court. *See* Appellant's Brief, pp.42-43 (citing *R., pp. 128-149*). Briefing is not evidence received by the trier of fact. The Court should disregard such citations.

The Idaho Supreme Court will not consider issues not supported by argument and authority in the opening brief:

> Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. This Court will not search the record on appeal for error. Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived.

Bettweiser, 154 Idaho at 323 (quoting *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146 (2010)) (internal citations omitted). Additionally, the Court will not consider issues "lacking in coherence, citations to the record, citations of applicable authority, or comprehensible argument." *Id.*

Greenfield's briefing suffers many of the same defects noted in the *Bach* and *Bettweiser* decisions. While Greenfield makes citations to legal authority, the relevance and applicability are not clear nor explained, and cogent argument is sparse. *See id.* Greenfield fails to distinguish between jury and district court determinations, fails to address the standard of review, seeks to supplement her trial presentation with exhibits and materials not introduced at trial, and essentially attempts to re-argue her entire case on the merits.

A. The District Court's Equitable Findings Regarding Alleged CC&R Violations: Issues 1 and 2.

Greenfield challenges numerous equitable determinations by the district court. The standard of review for a district judge's equitable decisions in a bench trial is abuse of discretion, and underlying findings of fact are reviewed for substantial evidence:

> Imposition of an equitable remedy requires a balancing of the equities, which is inherently a factual determination; therefore, the district court's imposition of such a remedy should be reviewed for an abuse of

> discretion. A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason.
>
> Review of a trial court's conclusions from a bench trial is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered. This Court will not set aside a trial court's findings of fact unless the findings are clearly erroneous. If the trial court based its findings on substantial evidence, even if the evidence is conflicting, this Court will not overturn those findings on appeal. This Court will not substitute its view of the facts for that of the trial court. However, this Court exercises free review over matters of law.

Justad v. Ward, 147 Idaho 509, 511, 211 P.3d 118 (2009) (internal citations omitted).

1. The District Court's Finding that the Bed and Breakfast Did Not Violate the CC&Rs Is Supported by Substantial Evidence.

Greenfield argues that the district judge erred in determining that the Wurmlingers' Bed and Breakfast is in compliance with Park Wood Place CC&Rs and in failing to enter injunctive relief.

As noted in Judge Haynes' Post Court Trial Memorandum Decision and Order, the applicable CC&R pertaining to the Bed and Breakfast was Article I, Section 1(a):

> No grantee under any conveyance, owner, tenant, or other person shall at any time conduct, or permit to be conducted on any lot, any trade or business of any kind, either commercial or religious, including, but not limited to, day care, school, nursery, out-patient, treatment, rehabilitation or recovery facilities, nor shall said premises be used for any other purpose whatsoever except for the purpose of a private dwelling or residence for one family. *Home occupations of family members, which have no exterior visibility, are not prohibited provided they are conducted*

> *totally within the residence, are not open to the public, have no employees and do not generate extra vehicular traffic or street parking.*

R., p. 428; Plaintiff's Trial Ex. #1 (emphasis added).

The district court found that the Wurmlingers' operation of the bed and breakfast does not violate the unambiguous[2] CC&Rs because it is a home occupation that complies with the restrictions provided in Article I, Section 1(a) of the CC&Rs.

The court's factual findings were supported by substantial evidence. First, it was undisputed that the Wurmlingers occupy a single family residence (*Tr., p. 805, l. 22*) and that the Bed and Breakfast has no employees (*Tr., p. 244, l. 10; p. 263, ll. 10-17*). No evidence was presented to the contrary.

Second, the district court found that the bed and breakfast has no exterior visibility. Evidence at trial, including photographs, demonstrated that the bed and breakfast has no exterior visibility and has the appearance of a nice home rather than an operating business. *See Defendants' Exhibit KK; see also Plaintiff's Exhibit 102.* Cathy Camyn, who lived in the Caretaker's house immediately South of the Wurmlinger's residence from 2000-2010, testified that the Wurmlingers' residence looked like a home. *Tr., p. 862, ll. 9-12.* Another neighbor and city council member, Joe Malloy, who lives across the street from Greenfield, testified that the Wurmlingers' residence looks like a nice house and he only realized the Wurmlingers were running a Bed and Breakfast when Eric Wurmlinger told him. *Tr., p. 884, ll. 2-18.*

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[2] Greenfield does not challenge the court's conclusion of law that the CC&Rs as a whole, and individually, are clear and unambiguous.

Third, the district court found that the Bed and Breakfast operates within the residence. *R., p. 431.* While guests do occasionally venture outside of the residence, such conduct as using the hot tub or the patio is not inconsistent with operating the Bed and Breakfast within the residence, nor is it inconsistent with the usual and expected activities of a residence. *Tr., Vol. I, pp. 231-232.* Eric and Rosalyn Wurmlinger testified that all Bed and Breakfast operations are conducted within the residence, and Eric Wurmlinger further testified that guests are attracted to the Bed and Breakfast because it is secluded and quiet. *Tr. Vol. I, p. 219, ll. 11-24; Tr. Vol. I, p. 224, ll. 17-18; Tr. Vol. I, p. 265, ll. 7-11; Tr., Vol. II, pp. 739-740.* Albert Hutson, a minister, testified that he previously conducted wedding ceremonies at the Bed and Breakfast, that any music was very quiet, and that the weddings were like private weddings in private homes. *Tr., Vol. II, pp. 867-873.* Rocky Pool, who lived next door to Greenfield opposite the Wurmlingers from 1993-2005, only knew that weddings were conducted because Eric Wurmlinger told him. *Tr., Vol. II, pp. 877-880.* Ashley Labau, another neighbor who rented the house next door to Greenfield opposite the Wurmlingers in 2009-2010, testified that she didn't hear any noise from the Wurmlingers' property. *Tr., Vol. II, pp. 847-848.* Finally, the court relied heavily on Judy Richardson's testimony, the previous owner of Greenfield's residence between 1993 and 2005. *R., p. 432.* She testified that she slept in the same bedroom that Greenfield currently sleeps in and never heard any excessive noise or believed that wedding ceremonies caused any problems. *Tr., Vol. II, pp. 717-722.*

The Bed and Breakfast is a home occupation which is entirely consistent with the daily comings, goings, and activities of a residence. That the exact number of residents fluctuates does

not change the nature of the residence. As such, the district court found that while guests do occasionally venture outside of the residence, such conduct as using the hot tub or the patio is not inconsistent with operating the Bed and Breakfast within the residence, nor is it inconsistent with the normal and expected activities of a residence. *R., p. 432.*

Fourth, the district court found that the Bed and Breakfast does not generate extra traffic or street parking. *R., p. 432.* The Court relied upon the testimony of former neighbors Richardson, Labau, Camyn, and Pool, as well as current neighbor Joe Malloy, who each testified that they did not observe increased traffic. *Tr., Vol. II, pp. 721-722; Tr., Vol. II, p. 848, ll. 18-20; Tr., Vol. II, p. 860, ll. 20-24; Tr., Vol. II, p. 878, ll. 23-25; Tr., Vol. II, p. 884, ll. 19-24.* Eric Wurmlinger also testified that guests rarely park on the street and most guests park in his driveway. *Tr., Vol. I, p. 271, ll. 1-13.* While Greenfield contends that Plaintiff's Exhibit #102 proves that the Wurmlingers' Bed and Breakfast caused increased traffic and parking because of its weddings, Eric Wurmlinger testified that the pictures in Plaintiff's Exhibit #102 of traffic and street parking depicts a one-time professional meeting event, and not an illustration of a typical wedding at the Bed and Breakfast. *Tr., Vol. II, pp. 705-707.* Eric Wurmlinger and Joe Malloy both further testified that get-togethers and parking on the street are common in the neighborhood. *Tr., Vol. II, pp. 708-709; Tr. Vol. II, pp. 885-887.*

Fifth, the district court found that the Bed and Breakfast is not open to the public. *R., p. 433.* Analogizing to common businesses, the court determined that open to the public means that

the public would be welcome to walk in off the street unannounced and uninvited.[3] *R., p. 433.* Eric Wurmlinger testified that the Bed and Breakfast is not open to the public, does not accept walk-up clientele, does not advertise with street signs, and doesn't invite the public to walk in without a reservation. *Tr., Vol. I, pp. 282-284; Tr., Vol. I, pp. 229-230; Tr., Vol. II, pp. 741-743.* Instead, the Wurmlingers described the procedure as: guests call and inquire about availability, the Wurmlingers ask questions about the guests, and then the Wurmlingers decide whether to invite the guests to stay. *Tr., Vol. I, pp. 229-230.*

Finally, Greenfield appears to contend that the Bed and Breakfast is a "business," not a home occupation. Notwithstanding that the terms are not mutually exclusive, evidence was presented that the Bed and Breakfast is indeed a permitted home occupation. *Tr., Vol. I, pp. 227-232.* The court's finding that the operation of the Bed and Breakfast does not violate the CC&Rs was supported by substantial evidence, and its finding should not be overturned. Accordingly, no equitable remedy was appropriate.

2. The District Court's Finding that the Arborvitae Trees Are Not Subject to the CC&R Section Restricting the Height of Fences Is Supported by Substantial Evidence.

Greenfield contends that the district judge erred in determining that the Wurmlingers' arborvitae trees do not violate the Park Wood Place CC&Rs and in failing to enter injunctive relief. The applicable CC&R pertaining to the arborvitae hedge is Article II, Section 2:

> Building Conditions: No building shall be erected except one detached single-family dwelling on each lot which does not exceed two and one half

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[3] Greenfield does not appear to challenge the district court's interpretation of the unambiguous CC&Rs term "open to the public."

> stories in height, together with a private attached garage for not less than two cars. No dwelling, building or other structure shall be moved on to any lot; new construction being required. No tent, trailer, mobile home, boat or other vehicle or structure shall be used or allowed for human habitation on a temporary or permanent basis on any lot at any time. *No lot, lots or parcels, shall ever be enclosed or fenced by any fence or structure exceeding five (5) feet in height.* Approval from the Architectural Control Committee shall be required for all fences.

R., p. 434; Plaintiff's Trial Ex. #1 (emphasis added).

Reiterating its conclusion that the CC&Rs are clear and unambiguous, the court found that the above section does not apply to the arborvitae because the hedge is not a fence. *R., p. 436.*

Article II, Section 2 provides restrictions relating to the construction and building of permanent man-made structures, like residences. *R., p. 436; see also Plaintiff's Trial Ex. #1.* Meanwhile, the only CC&R section which speaks to landscaping and trees is Article II, Section 1, providing that no new buildings may be erected until the construction, landscaping, and tree plans are approved by the Architectural Control Committee. *See Plaintiff's Trial Ex. #1.* Eric Wurmlinger testified that the Architectural Control Committee approved of the Wurmlingers landscaping plans. *Tr., Vol. I, pp. 417-419.*

Article II, Section 8 of the CC&Rs contemplates that the owners of lots 1 and 17 shall maintain the "fences" on their lots. *Plaintiff's Trial Ex. #1.* Lots 1 and 17 are opposing lots at the entrance to the development. Each lot has a fence along its boundary, which culminate in forming the entrance to the development. Eric Wurmlinger testified that both of these fences are ordinary and typical stone column and wood board fences marking the entrance to the

subdivision – strong evidence that the term "fence" within the CC&Rs means a man-constructed structure, not a border formed by vegetation or landscaping. *Tr., Vol. I, pp. 419-420.*

Additionally, Joe Malloy testified that prior to Greenfield's Complaint, nobody else in the neighborhood had ever contended that arborvitae are fences subject to the five foot CC&R fence height restriction. *Tr., Vol. II, pp. 883-884.* Rocky Pool testified that his arborvitae hedge grew to approximately eight feet in height. *Tr., Vol. II, p. 879, ll. 6-15.* Cathy Camyn also testified that the River House has arborvitae rows in excess of six (6) feet in height. *Tr., Vol. II, p. 864, ll. 1-12.*

Therefore, the district court's findings of fact were supported by substantial evidence, and the court's factual findings support its conclusion that the Wurmlingers' arborvitae are not a fence under Article II, Section 2. In light of this finding, no equitable relief was appropriate.

B. Jury Findings On The Non-Equitable Claims

Again, appellant has not distinguished between findings made by the district court, and those made by the jury. Nevertheless, all of the non-equitable issues were determined by the jury. Greenfield challenges numerous findings regarding the arborvitae trees and the Bed and Breakfast which were made by the jury. Jury findings are subject to a substantial evidence standard of review: "This Court will not overturn a jury verdict if it is supported by substantial and competent evidence ... A jury verdict must be upheld if there is evidence of sufficient quantity and probative value that reasonable minds could have reached a similar conclusion to that of the jury." *Vanderford v. Knudson*, 144 Idaho 547, 552, 165 P.3d 261 (2007) (internal citations omitted).

1. Plaintiff Greenfield's Claims: Issues 3, 4 and 5.

a. The Jury's Finding that the Bed and Breakfast Is Not a Nuisance Is Supported by Substantial Evidence.

Greenfield does not appear to specifically appeal the jury's finding that the Bed and Breakfast does not constitute a nuisance. However, given that this issue was central in the trial below and of great importance to the Wurmlingers, it is briefly addressed here. Idaho law recognizes that lawful, reasonable use of property is not a nuisance, even if it affects neighboring property. Where "Respondents' business was lawful in itself and was conducted in a community where it had a legal right to be, ... , whether such property constituted a nuisance presents the question whether the use to which the property was put was reasonable or unreasonable." *McNichols v. J.R. Simplot Co.*, 74 Idaho 321, 323, 262 P.2d 1012 (1953) (citing *Payne v. Johnson*, 20 Wn.2d 24, 145 P.2d 552 (1944); *Canfield v. Quayle*, 170 Misc. 621, 10 N.Y.S.2d 781 (1939); *Hansen v. Independent School Dist. No. 1*, 61 Idaho 109, 98 P.2d 959 (1939)).

The jury received testimony regarding the Bed and Breakfast's operations and determined that it was not a nuisance. *R., p. 260.* Evidence was presented that the Bed and Breakfast is indeed a lawful permitted home occupation. *Tr., Vol. I, pp. 227-232.* Judy Richardson, who previously lived in Greenfield's house, testified that the Bed and Breakfast did not cause any disturbances to her. *Tr., Vol. II, pp. 720-722.* Judy Richardson further testified that she slept in the same bedroom that Greenfield currently sleeps in and never heard any excessive noise. Nor did she believe that the occasional wedding ceremony caused any problems. *Tr., Vol. II, pp. 717-*

722. The Bed and Breakfast operation was substantially similar when Ms. Richardson lived in the home as when Greenfield has lived in the home.

Eric Wurmlinger testified that guests are attracted to the Bed and Breakfast because it is secluded and quiet. *Tr. Vol. I, p. 219, ll. 11-24; Tr. Vol. I, p. 224, ll. 17-18; Tr. Vol. I, p. 265, ll. 7-11; Tr., Vol. II, pp. 739-740.* Albert Hutson, a minister, testified that he previously conducted wedding ceremonies at the Bed and Breakfast, that any music was very quiet, and that the weddings were like private weddings in private homes. *Tr., Vol. II, pp. 867-873.* Ashley Labau testified that she didn't hear any noise from the Wurmlingers' property. *Tr., Vol. II, pp. 847-848.*

The Bed and Breakfast does not generate extra traffic or street parking. Former neighbors Richardson, Labau, Camyn, and Pool, as well as current neighbor Joe Malloy, each testified that they did not observe increased traffic. *Tr., Vol. II, pp. 721-722; Tr., Vol. II, p. 848, ll. 18-20; Tr., Vol. II, p. 860, ll. 20-24; Tr., Vol. II, p. 878, ll. 23-25; Tr., Vol. II, p. 884, ll. 19-24.*

Therefore, the jury's finding that the Bed and Breakfast does not constitute a nuisance is supported by substantial evidence.

b. The Jury's Finding that the Arborvitae Hedge Is Not a Nuisance Is Supported by Substantial Evidence.

Greenfield contends that the jury erred by finding that the arborvitae are not a nuisance. The Wurmlingers' use of their property to maintain the arborvitae shrubs for privacy is lawful and was approved by the city. *Tr., Vol. I, pp. 327-328.* Therefore, in order to constitute a nuisance, the Wurmlingers' use of the property to maintain the arborvitae shrubs for privacy must be unreasonable. In other words, the Wurmlingers' lawful use of their property to maintain the

arborvitae shrubs for privacy is not a nuisance if it is a reasonable use of their property. Maintaining shrubs near the property boundary for privacy does not unreasonably interfere with Greenfield's use and enjoyment of her own property.

"Generally, a landowner does not have a right of access to air, light, and view over adjoining property, and the law is reluctant to imply such a right." 1 Am. Jur. 2d *Adjoining Landowners*, § 93 (2005) (citing *Mira Mar Mobile Community v. City of Oceanside*, 119 Cal. Rptr. 3d 308 (4th Dist. 2004), as modified, (July 13, 2004); *Stewart v. Secor Realty & Inv. Corp.*, 667 So. 2d 52 (Ala. 1995) (A property owner is not entitled to a view); *Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community*, 178 Cal. App. 3d 1147, 224 Cal. Rptr. 380 (4th Dist. 1986)). "The general common-law rule is that one cannot complain of trees or shrubbery on adjoining land regardless of their thickness or height, since the adjoining landowner is within his or her rights in making such use of his or her land." 1 Am. Jur. 2d *Adjoining Landowners*, § 32 (2005) (citing *Granberry v. Jones*, 188 Tenn. 51, 216 S.W.2d 721 (1949)). As a general rule, there is no nuisance simply because a neighboring landowner has used his or her property in a way that obstructs the view of an adjacent landowner. *Collinson v. John L. Scott, Inc.*, 55 Wn. App. 481, 485, 778 P.2d 534 (1989) (citing *Scharlack v. Gulf Oil Corp.*, 368 S.W.2d 705, 707 (Tex. 1963); *Wolf v. Forcum*, 130 Ind.App. 10, 161 N.E.2d 175 (1959); *Venuto v. Owens-Corning Fiberglas Corp.*, 99 Cal. Rptr. 350, 22 Cal.App.3d 116 (1971); *Mohr v. Midas Realty Corp.*, 431 N.W.2d 380 (Iowa 1988)); *see also 8,960 SQ. Feet v. Dept. of Transp.*, 806 P.2d 843 (Alaska 1991) (citing *La Plata Elec. Ass'n v. Cummings*, 728 P.2d 696 (Colo. 1986); 2A J. Sackman & P. Rohan, Nichols' The Law of Eminent Domain, § 6.32 at 6-226 (rev. 3d ed. 1989);

44 Plaza, Inc. v. Gray-Pac Land Co., 845 S.W.2d 576 (Mo. 1992); *Kruger v. Shramek*, 5 Neb. App. 802, 565 N.W.2d 742 (1997)).

Applying these general principles to Idaho nuisance law, the Wurmlingers' use of their property to maintain arborvitae shrubs for privacy is reasonable. Where an owner's use of property is lawful and reasonable, that use is not a nuisance.

Greenfield suggests that the shrubs are a nuisance under the spite fence doctrine, citing *Sundowner v. King*, 95 Idaho 367, 509 P.2d 785 (1973). However, Greenfield never pled a spite fence cause of action and that doctrine is only applicable where a property owner erects a useless structure for the sole purpose of injuring his neighbor. *See Id.*

The jury received evidence about Greenfield's view and how the arborvitae growth affects Greenfield's view. *Tr., Vol. II, p. 552, ll. 5-24; Tr. Vol. II, pp. 718-719*; *Tr., Vol. II, p. 844, ll. 11-14; Tr., Vol. II, pp. 626-627; Plaintiff's Trial Exhibit 25-1; Plaintiff's Trial Exhibit 102-E.* Judy Richardson, previous owner of Greenfield's home, testified that Greenfield knew about the arborvitae when she purchased the home and that they were fairly high but Greenfield made no complaint about them. *Tr., Vol. II, pp. 724-725.* Richardson also testified that the arborvitae provide good privacy for both homes. *Tr., Vol. II, p. 725, ll. 2-14.* Greenfield acknowledged that at the time she bought the home, the arborvitae were at approximately the height of the eaves of the Wurmlinger residence – probably eight or nine feet high. *Tr., Vol. II, pp. 591-592.* The Wurmlingers testified that they planted and maintain the arborvitae for privacy and aesthetic purposes. *Tr., Vol. II, P. 769, ll. 5-8.* Therefore, the jury's finding that neither the

arborvitae trees nor the Bed and Breakfast constituted a nuisance was supported by substantial and competent evidence.

The jury found that the arborvitae are not a nuisance, and that finding is supported by substantial evidence. Accordingly, no injunctive relief was appropriate and Greenfield's challenge in that regard also fails.

c. The Jury's Finding that the Wurmlingers Did Not Negligently Inflict Emotional Distress on Greenfield is Supported by Substantial Evidence.

Greenfield attempts to reargue the merits of her negligent infliction of emotional (NIED) claim on appeal. She makes passing reference to the dismissal of her intentional infliction of emotional distress claim on summary judgment (*R., p. 175*), but she does not appeal that dismissal. Greenfield's intentional infliction of emotional distress claim alleged extreme, outrageous conduct by Wurmlingers, including, *inter alia*, falsely accusing her of damaging/destroying the arborvitae hedge which resulted in her being criminally charged and prosecuted. Greenfield contended that she had reached an agreement with defendants that they would keep the hedge trimmed to a six foot height and that their failure to do so entitled her to essentially cut the height of the hedge in half. Greenfield's NIED claim was based on the same alleged conduct by the Wurmlingers, except such conduct was styled as a "breach of duty." The Court allowed plaintiff to proceed with a negligent infliction of emotional distress claim which included her effort to prove a "contract" with the Wurmlingers that they would maintain the hedge.

On appeal, she appears to claim that the jury should have awarded damages to her for NIED caused by trespassing, installing surveillance cameras, and allegedly making false statements to the police.

In order to prove NIED, a claimant must show (1) a legal duty, (2) breach, (3) causing, (4) actual loss or damage, and (5) a physical manifestation of the claimant's emotional injury. *E.g., Frogley v. Meridian Joint School*, 155 Idaho 558, 569, 314 P.3d 613 (2013).

Evidence also showed that the Wurmlingers did not have any agreement with Greenfield to maintain the arborvitae at any specific height. *Tr., Vol. I, pp. 322-326; see also Plaintiff's Exhibit 16.* The Wurmlingers also testified that they only provided accurate information to the police. *E.g., Tr., Vol. I, p. 368, ll. 2-18; Tr., Vol. I., pp. 384, ll. 21-24; Tr., Vol. II, p. 744, ll. 20-22.* In contrast to her Complaint, Greenfield testified that the only untruthful representations Wurmlingers made to the police were that the arborvitae were located on their property, and that the pictures of the arborvitae they provided the police were not accurate. *Tr. Vol. II, pp. 616-617.*

Moreover, the jury received evidence that the Wurmlingers did not trespass, that the surveillance cameras were intended and aimed only to monitor the Wurmlinger property, and that the Wurmlingers did not make false reports to the police. *Tr., Vol. II, p. 781, ll. 1-3; Tr., Vol. II, pp. 709-712; Tr., Vol. II, p. 744, ll. 20-22.* The jury specifically found that the Wurmlingers had not negligently inflicted emotional distress on Greenfield (*R., p. 261*), and that finding was supported by substantial evidence.

Finally, Greenfield makes numerous citations to her Amended Trial Brief (*R., pp. 122-165*) in an attempt to establish that she actually suffered emotional distress and physical

manifestations thereof. However, Greenfield's Amended Trial Brief is not evidence heard by the trier of fact. Greenfield has failed to cite a single piece of evidence demonstrating that she suffered emotional distress or any physical manifestation thereof.

2. Defendants Wurmlingers' Counterclaims: Issue 7

a. The Jury's Timber Trespass Verdict Is Supported by Substantial Evidence.

Greenfield challenges several aspects related to the jury's finding of timber trespass. First, Greenfield argues that the jury could not have found that she committed timber trespass because the arborvitae are shrubs as opposed to trees. Timothy Kastning, certified master arborist, testified that the industry considers trees to be plants that can grow to more than fifteen (15) feet in height. *See Defendants' Trial Exhibit UU (Depo. Tr., p. 44, ll. 3-9).* Kastning continued that arborvitae can grow to heights of forty (40) feet and that he's worked on arborvitae twenty (20) to twenty five (25) feet in height. *Id. (Depo. Tr., p. 44, ll. 11-20).* The jury received evidence that, at times, the Wurmlingers' arborvitae were at least fifteen (15) feet in height. *Defendants' Trial Exhibits H, I-2.* Even Greenfield's expert witness, certified arborist Joseph Zubaly, testified that the Wurmlingers' arborvitae could grow to approximately twenty (20) feet in height. *Tr., Vol. I, pp. 431-432.* Rod Gunderson, the police detective assigned to investigate the cutting, testified from a lay person's perspective that the arborvitae are more like trees than shrubs. *Tr., Vol. II, p. 650, ll. 3-10.*

The jury unanimously answered the special verdict form question 14 that, based on the evidence presented, the arborvitae are trees. *R., 263.* The jury's finding was supported by substantial evidence and should not be overturned.

Second, Greenfield argues that the jury could not have awarded damages for timber trespass because the arborvitae were not located on the Wurmlingers' property. The jury received evidence that the arborvitae trees were planted and located on the Wurmlingers' side of the property line. *Tr., Vol. I, p. 289, ll. 11-24; Tr., Vol. II, p. 785, ll. 7-8; Tr., Vol. II, p. 743-744; Defendants' Trial Exhibit B.* Therefore, the jury's finding is supported by substantial evidence.

Third, although unclear, Greenfield may be attempting to challenge whether there was substantial evidence to support the jury's finding that Greenfield acted intentionally or willfully in committing timber trespass.

The evidence was uncontroverted that Greenfield's agent, Monroe Greenfield, intentionally cut the arborvitae on the Wurmlingers' property. *Tr. Vol. I, pp. 483-486; Tr., Vol. II, pp. 887-888.* While I.C. § 6-202 is not intended to apply to trespasses committed through an innocent mistake as to the property boundary, a trespasser acts willfully and intentionally where the trespasser has notice that the property is in dispute. *Weitz v. Green,* 148 Idaho 851, 863-864, 230 P.3d 743 (2010). That Greenfield chose to cut the arborvitae while the Wurmlingers were on vacation tends to show either (1) Greenfield knew that the arborvitae were on the Wurmlinger property, or (2) that she knew the property was in dispute because the Wurmlingers at least believed the arborvitae were on the Wurmlinger property. *Tr., Vol. II, p. 752, ll. 6-18; Tr., Vol. II, pp. 887-888.* Indeed, there was also evidence that Greenfield had previously acknowledged

that the arborvitae were on the Wurmlingers' property. *Tr., Vol. II, p. 785, ll. 1-8; Tr., Vol. II, p. 835, ll. 2-8.*

Fourth, Greenfield appears to argue that the timber trespass verdict is not supported by substantial evidence that the trees were damaged. However, Tim Kastning testified that the arborvitae trees main stock would never re-grow and concluded that restoration was the appropriate remediation to be done under the circumstances. *See Defendants' Trial Exhibit UU (Depo. Tr., pp. 31-33; p. 37, ll. 16-19).*

Timber trespass damages may be based upon aesthetic value and other specific and personal reasons. *Weitz v. Green*, 148 Idaho 851, 863-867, 230 P.3d 743 (2010). The Wurmlingers testified that they value the arborvitae for specific and personal reasons, including privacy and aesthetics, and that the cutting affected those purposes, thereby justifying replacement value as an appropriate measure of damages. *Tr., Vol. II, p. 769, ll. 5-8; Tr., Vol. II, p. 771, ll. 2-12.* For example, the cutting allowed a direct view from Greenfield's deck into one of the Bed and Breakfast bedroom windows. *Tr., Vol. II, pp. 770-771.* Kastning also testified that the actual replacement value of the arborvitae would be approximately $17,000.00. *See Defendants' Trial Exhibit UU (Depo. Tr., p. 39, ll. 17-23).* Evidence was presented as to the height of the arborvitae when they were cut and how much was cut. *Tr., Vol. II, pp. 756-763; Tr., Vol. II, p.652, ll. 14-23; Defendants' Trial Exhibits H, I-2.* Greenfield did not object to the jury instructions or the special verdict form. *Tr. Vol. III, p. 967, ll. 8-13.* Therefore, the jury's timber trespass damage award is supported by substantial evidence.

Although difficult to follow, Greenfield appears to argue, for the first time, that she was allowed to cut the arborvitae in abating a nuisance, pursuant to I.C. § 52-302. However, as argued *supra*, the jury concluded that the arborvitae hedge was not a nuisance, and that conclusion was based on substantial evidence. *R., p. 260.* Accordingly, no right to abate was developed at trial.

C. The District Court Did Not Abuse its Discretion in Finding that the Wurmlingers' Negligent Infliction of Emotional Distress Claim Was Tried by Consent of the Parties Pursuant to I.R.C.P. 15(b): Issue 6.

Greenfield does not appeal the jury's finding that her conduct inflicted emotional distress on the Wurmlingers. Rather, she contends that the claim was not "properly disclosed" and that it has been previously dismissed. These assertions were not made until after the verdict and the judge's decision had been returned. Accordingly, the issue before the Court is whether the NIED claim was tried with the consent of the parties, and whether Ms. Greenfield has preserved that issue when she failed during trial to object to the evidence, the jury instructions, or the special verdict form.[4]

The determination whether an issue has been tried with the consent of the parties pursuant to I.R.C.P. 15(b) is within the trial court's discretion, and such determination will only be reversed when that discretion has been abused. *Belstler v. Sheler*, 151 Idaho 819, 825, 264 P.3d 926 (2011).

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[4] Greenfield first raised her argument that the Wurmlingers had previously dismissed their emotional distress claims rather cryptically in her "Rebuttal to Defendants' Memorandum in Opposition to Plaintiff's Motion to Set Aside Judgment and Motion for Judgment Notwithstanding the Verdict" (Reply Brief) *R., p. 341; see also Tr., Vol. III, p. 1013-1014.*

During the pre-trial conference, the court clarified the issues for trial. *Tr., Vol. I, p. 132, ll. 12-25.* The district court stated, "looks like we have some consensus on what is the existence of the defendants' claims," and gave Greenfield another opportunity to object to, clarify, or remark about the Wurmlingers' claims, but Greenfield made no objection, question, or comment regarding the court's allowing evidence of NIED. *Id. at pp. 143-144.* The Wurmlingers presented evidence during their case-in-chief as to how Greenfield's conduct had caused them emotional distress. The Wurmlingers proposed jury instructions for both NIED and intentional infliction of emotional distress which included Wurmlingers NIED claim. *Tr. Vol. I, pp. 142-143.* The district court presented a Special Verdict Form, which included questions regarding Wurmlingers' claim of NIED. Greenfield did not object or make any record to either the instructions as give, or to the Special Verdict Form. *Id.* After trial, Greenfield revealed that she indeed understood "that if the jury found that there was any type of infliction of emotional distress on the defendants after hearing the proceedings at the trial then maybe they could grant it." *Tr. Vol. III, p. 1017, ll. 13-17.*

To the extent Greenfield also appeals giving the NIED jury instruction, I.R.C.P. 51(b) states in relevant part: "No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which that party objects and the grounds of the objection." Additionally, "The correctness of jury instructions 'is a question of law over which this Court exercises free review, and the standard of review of whether a jury instruction should or should not have been given, is whether there is evidence at trial to support the instruction.'" *Craig*

Johnson Constr., L.L.C. v. Floyd Town Architects, P.A., 142 Idaho 797, 800, 134 P.3d 648 (2006). Greenfield did not object to any jury instructions, thereby waiving any assignment of error that the court improperly gave the NIED jury instruction. *Tr. Vol. III, p. 967, ll. 8-13.*

In addition, both Eric Wurmlinger and Rosalynn Wurmlinger testified that the emotional distress caused by Greenfield's negligent harassing conduct resulted in physical manifestations. *Tr., Vol. II, pp. 795-796; Tr., Vol. III, pp. 935-936.* Such testimony was not relevant to any issue other than the Wurmlingers' NIED claims, yet, again, Greenfield never objected. After hearing the testimony, the jury found that Greenfield had inflicted emotional distress, and that finding is supported by substantial evidence.

The record clearly shows that Greenfield knew in advance of trial and all along that the Wurmlingers were claiming NIED, that the Wurmlingers would and did present evidence of NIED, and that the jury would decide whether Greenfield was liable for NIED. However, Greenfield never objected to the claim during the pretrial conference, never objected to the NIED testimony by Wurmlingers, never objected to the NIED jury instructions nor to the special verdict form which requested the jury's determination of the issue.

"The purpose of Rule 15(b) is to allow cases to be decided on the merits rather than upon technical pleading requirements." *Belstler*, 151 Idaho at 825. Where a party fails to object to evidence on an unpleaded issue while understanding the evidence to be aimed at the unpleaded issue, there is implied consent to try that unpleaded issue. *Id.*

While noting that it was not a proper issue for Greenfield's I.R.C.P. 50(b) motion, Judge Haynes' Order Re: Plaintiff's Motions for JNOV and Set Aside Judgment demonstrates that

Judge Haynes understood the issue as one within its discretion, acted within the bounds of that discretion, and reached the decision by an exercise of reason. *R., pp. 413-414.* The District Court did not abuse its discretion in finding that the Wurmlingers' NIED claim had been tried with the consent of the parties and did not err by submitting it to the jury.

D. Greenfield Never Objected to Any Jury Instructions or the Special Verdict Form, She Has Thus Failed to Preserve Those Issues for Appeal: Issue 8.

Greenfield contends that the jury instructions and the special verdict form were improperly amended and submitted. Greenfield does not explicitly appeal the decision to give any specific jury instruction or any portion of the special verdict form. She appears instead to object generally that the jury instructions and special verdict form were untimely. It is not clear what she means by this.

As previously noted, "No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which that party objects and the grounds of the objection." I.R.C.P. 51(b).

Greenfield was presented with an opportunity to object to any jury instructions to be given, and Greenfield did not object, thereby waiving any assignment of error. *Tr. Vol. III, p. 967, ll. 8-13.* Greenfield does not cite any objection to the jury instructions or the special verdict form. Thus, Greenfield failed to preserve these issues for appeal, and they need not be addressed.

E. The District Court Did Not Abuse its Discretion by Admitting the Monaco Survey: Issue 9.

Greenfield contends that the Wurmlingers' survey should not have been admitted as it was not properly signed pursuant to I.C. § 54-1215.

> Trial courts have 'broad discretion in the admission of evidence at trial, and [their] decision to admit such evidence will be reversed only when there has been a clear abuse of that discretion.' ... In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties.

Karlson v. Harris, 140 Idaho 561, 564, 97 P.3d 428 (2004) (internal citations omitted).

Idaho Code § 54-1215 is not an evidentiary rule of admissibility. Jon Monaco testified as to the methods used to conduct the survey and how the measurements, recordings, and findings were accurately transferred to and portrayed on the survey. *Defendants' Trial Exhibit TT (Depo. Tr., pp.13-17).* As such, the survey was sufficiently authenticated, and the district court did not abuse its discretion in allowing admission of the survey.

Even if the district court did err, any error was harmless as it was mitigated by Monaco's deposition testimony and other testimony regarding the location of the arborvitae. *White v. Mock*, 140 Idaho 882, 891, 104 P.3d 356 (2004); for such evidence, see: *Defendant's Trial Exhibit TT (Depo. Tr., pp.13-19); Tr., Vol. I, p. 289, ll. 11-24; Tr., Vol. II, p. 785, ll. 7-8; Tr., Vol. II, p. 743-744.*

F. Greenfield's Allegations of Constitutional Rights Violations Are Misplaced: Issue 10.

Greenfield seeks to assert a violation of her constitutional rights pursuant to 42 U.S.C. § 1983, contending that the district court deprived her of a federal right under color of law.

Although Greenfield may believe she has such a claim, her remedy is not during the appeal of her state court action against the Wurmlingers. Such a claim was never pled against Wurmlingers and, had it been, would not have stated a claim. As private citizens, the Wurmlingers' conduct isn't attributable to the state and cannot form the basis of a § 1983 claim. "The under-color-of-state-law element of a § 1983 claim excludes from its reach merely private conduct." *Marsh v. County of San Diego*, 680 F.3d 1148 (9th Cir. 2012).

Additionally, Greenfield contends that the district court denied her Fourteenth Amendment right to Due Process. Perhaps this is the constitutional right Greenfield feels was violated, providing her a § 1983 claim. However, again, any such claim would be against the appropriate governmental entity rather than asserted against the Wurmlingers on appeal.

Greenfield does not explain how her constitutional rights have been violated other than that she disagrees with the result of her trial. She doesn't support her claims with appropriate citations to the appellate record. She has failed to designate specific assignments of error by the district court. Nor does she explain what the Supreme Court can or should do about these alleged violations on appeal. Greenfield's allegations of Constitutional rights violations have no place in this appeal.

G. Appellant Has Failed to Preserve any Issue Regarding Recusal of Judge Haynes: Issue 11.

Greenfield argues that Judge Haynes was biased against her and should have recused himself.

> "In the absence of a motion for disqualification, this Court will not review that issue on appeal." Because recusal from a case is committed to the

> sound discretion of the judge, in the absence of a motion there is no decision of the court that can be reviewed, nor was a factual record developed regarding the issue.

Flying "A" Ranch, Inc. v. Bd. of Cty. Comm'rs for Fremont Cty., 2014 WL 2726713, Docket No. 40987-2013, pp. 10-11 (Idaho 6-17-2014) (internal citations omitted). It is the appellant's duty "to not only clearly state its contentions to the trial judge, but to make such contentions, and the rulings thereon, of record so they may be reviewed on appeal." *Van Velson Corp. v. Westwood Mall Assocs.*, 126 Idaho 401, 406, 884 P.2d 414, 419 (1994). "[E]ither the specific ground for the objection must be clearly stated, or the basis of the objection must be apparent from the context." *Slack v. Kelleher*, 140 Idaho 916, 921, 104 P.3d 958, 963 (2004).

Greenfield did not make a motion for disqualification. Greenfield first attempted to raise judicial bias in her Post Verdict Motions. See "Amended and Supplemental Affidavit of Christina J. Greenfield in Support of Motion to Reconsider [the Denial of Greenfield's JNOV and Set Aside Motions]." *See R.., pp. 506-508.* Putting aside the question of whether those bare allegations would be sufficient to preserve the disqualification/bias issue for appeal, the district court granted the Wurmlingers' Motion to Strike Greenfield's "Amended and Supplemental Affidavit" in support of her Motion to Reconsider as untimely and without justification. *R., p. 653.* Greenfield does not appeal the district court's decision to strike those supplemental pleadings.

As such, not only did Greenfield fail to make a motion to disqualify Judge Haynes, but she never even raised a timely issue with the district court. Therefore, Greenfield failed to preserve the disqualification/bias issue for appellate review, and the Court need not consider it.

Furthermore, a review of the transcript and record will reveal that the proceedings had the benefit of an unbiased judge attempting to achieve justice within the applicable rules. One obvious example occurred during attorney Riseborough's cross-examination of Greenfield, wherein he was attempting to establish that Greenfield's representations regarding her prior occupations were inaccurate and incomplete. Judge Haynes, *sua sponte*, interrupted this cross-examination and warned that in the district court's opinion, Riseborough was wasting time. *Tr., Vol. II, p. 569-571.* Further, numerous objections asserted by Ms. Greenfield were sustained by the trial court, numerous objections by Mr. Riseborough were overruled (*see log of Greenfield's sustained objections and Riseborough's overruled objections, attached hereto as Exhibit "A")* and the trial court took the opportunity on occasion to assist Ms. Greenfield with the procedural and evidentiary issues. *E.g., Tr., Vol. I, pp. 144-145*; *Tr., Vol. I, p. 294, ll. 10-15; Tr., Vol. II, pp. 513-514; Tr., Vol. II, pp. 523-525.*

H. The District Court Did Not Commit a "Fraud Upon the Court": Issue 12.

Greenfield's argument that Judge Haynes committed a "fraud upon the court" is incomprehensible. Ms. Greenfield cites a "confidential bench memorandum" in support of her fraud claim. How Ms. Greenfield came into possession of such a confidential memorandum is unclear, but her use of it is a sad example of Ms. Greenfield's colored judgment and her "ends justify the means" approach.

In any event, this is not a proper argument as contemplated by I.R.C.P. 60(b). The confidential memorandum does not reflect tampering with the administration of justice so as to suggest a wrong against the institution set up to protect and safeguard the public. *Catledge v.*

Transport Tire Co., 107 Idaho 602, 607, 691 P.2d 1217 (1984). Moreover, the Confidential Memorandum is not part of the appellate record. Rather it is confidential and exempt from disclosure pursuant to I.C.A.R. 32(g)(21). *See also Respondents' Motion to Strike.* The judgment of the district court should be affirmed.

I. The District Court Did Not Abuse its Discretion by Awarding Costs and Attorney Fees to the Wurmlingers: Issue 13.

The timber trespass statute provides for an award of fees to the prevailing party. I.C. § 6-202. The Wurmlingers received a money judgment on their timber trespass claim. *R., p. 349.*

Article III, Section 1 of the CC&Rs provides that if a lawsuit is brought to enforce the covenants, the prevailing party is entitled to an award of costs and reasonable attorney fees. *Plaintiff's Trial Ex. #1.* Greenfield's CC&R claims were dismissed. *R., p. 439.*

The Wurmlingers moved for costs and attorney fees, submitting supporting affidavits from each of their attorneys detailing the amount of time spent and fees charged for representation related to the timber trespass and CC&R issues. *See R., pp. 665-667.*

Determination of an award of costs, attorney's fees, and the prevailing party are matters within the discretion of the trial court. *Lettunich v. Lettunich*, 141 Idaho 425, 434-435, 111 P.3d 110 (2005). In granting the Wurmlingers' motion, the district court recognized its discretion, acted within the bounds of that discretion, and reached its conclusion through the exercise of reason. *R., pp. 668-673.* Therefore, the district court did not abuse its discretion by awarding costs and attorney fees to the Wurmlingers.

ATTORNEY FEES ON APPEAL

The Wurmlingers request attorney fees on appeal. An award of attorney fees on appeal may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party. *Excel Leasing Co. v. Christensen*, 115 Idaho 708, 712, 769 P.2d 585 (App. 1989). Such an award is appropriate when the Supreme Court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Id.* An appeal may be deemed frivolous, and attorney fees awarded, for failure to properly comply with I.A.R. 35(a)(6), requiring cogent legal argument with respect to the issues presented on appeal, with citations to the authorities and appellate record. *Woods v. Sanders,* 150 Idaho 53, 61, 244 P.3d 197 (2010). In particular, an award will be made if an appeal does no more than simply invites the appellate court to second-guess a trial court on conflicting evidence, or – on review of discretionary decisions – no cogent challenge is presented with regard to the trial judge's exercise of discretion. *Pass v. Kenny*, 118 Idaho 445, 449, 797 P.2d 153 (App. 1990).

Appellant's presentation on appeal is similar to that presented in *Kirkman v. Stoker*, 134 Idaho 541, 546, 6 P.3d 397 (2000). She argues numerous issues she failed to preserve for appeal by proper objection. *Id.* She argues with findings of fact and discretionary decisions and invites this Court to substitute its own judgment for that of the trial court. *Id.* Therefore, the Wurmlingers should be awarded reasonable attorney fees on appeal.

Even if the Court finds that Greenfield has not pursued this appeal frivolously, unreasonably, or without foundation, to the extent they prevail, the Wurmlingers request reasonable attorney fees for work associated with the timber trespass and CC&R claims.

The timber trespass statute, I.C. § 6-202 specifically includes "a reasonable attorney's fee which shall be taxed as costs, in any civil action brought to enforce the terms of this act if the plaintiff prevails." Similarly, Article III, Section 1 of the CC&Rs provides that, "In any suit or action brought to reinforce these covenants, the prevailing party shall be entitled to recover costs and reasonable attorney fees from the other party." *Plaintiff's Trial Ex. #1.*

Therefore, the Wurmlingers should be awarded reasonable attorney fees on appeal pursuant to I.A.R. 41 and I.C. § 12-121 because this appeal was pursued frivolously, unreasonably, and without foundation. Alternatively, to the extent they prevail, the Wurmlingers should be awarded reasonable attorney fees on appeal for work associated with the timber trespass and CC&R claims.

CONCLUSION

For the reasons stated herein, the Wurmlingers respectfully request that the judgment of the district court be affirmed in its entirety.

DATED this 12th day of August, 2014.

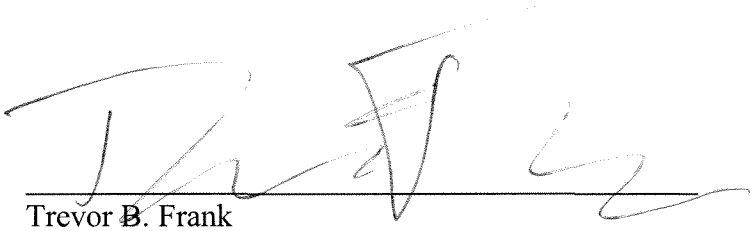
PAINE HAMBLEN LLP

By: _____
John C. Riseborough
Trevor B. Frank
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of August, 2014, I caused to be served a true and correct copy of **Respondents' Appellate Brief** by placing said document in the U.S. Mail, postage pre-paid and addressed to the following:

Christina J. Greenfield
210 S. Parkwood Place
Post Falls, ID 83854



Trevor B. Frank

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